(19)

No. 03-1388

IN THE

Supreme Court of the United States

Douglas Spector, *et al.*,
Petitioners,

v.

Norwegian Cruise Line Ltd.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent asserts an unconditional right to conduct its business in U.S. territory in violation of the Americans With Disabilities Act: to charge Americans with disabilities more to travel on ships leaving from and returning to U.S. ports; to refuse to provide them with evacuation instructions; to keep in place barriers to their access that could easily be removed; and to exclude them from its vessels altogether. Under respondent's reading of the law, its ships were entitled to discriminate against Americans with disabilities even when they served as "floating hotels" for thousands of visitors to the 2005 Super Bowl in Jacksonville, Florida. See Rania Deimeiz, *Cruise Ships To Serve as Floating Hotels for Super Bowl XXXIX*, TRAVEL DAILY NEWS, Feb. 3, 2005

Respondent's absolutist position refuses to acknowledge that the statutory scheme and this Court's precedents address any legitimate concerns regarding the ADA's application to foreign vessels, without granting cruise lines *carte blanche* to engage in discrimination while conducting business within U.S. territory. First, the ADA does not conflict with international conventions that deal with safety at sea. Title III requires that barriers be removed only when "readily achievable" and operates in harmony with this nation's treaty commitments (which in any event impose only "minimum" standards relating to safety). There is moreover no conflict between the ADA and the disability laws of other countries; if such a conflict developed in the future, it would no doubt be addressed by a new international convention, just as was the case with maritime safety standards.

Second, nothing justifies creating an exception to the strong presumption that U.S. law governs activity within our territory. Respondent's discrimination against passengers and potential passengers does not involve the "internal affairs" of its vessels. Nor do respondent's activities fall within the narrow class of cases in which a foreign vessel's contacts with the U.S. are so incidental as to make the application of

U.S. law inappropriate. Petitioners (like the overwhelming majority of passengers on cruises departing from this country) are U.S. citizens who traveled to and from U.S. ports. The contract between petitioners and respondents was formed in the United States on the basis of advertising here and (by respondent's design) mandates the application of U.S. law to disputes arising from it. Respondent has its principal place of business in this country. Congress could not have intended to carve these facts out of its "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1).

I. Given That Title III Of The ADA Applies To Cruise Ships Generally, It Follows That The Statute Applies Equally To Foreign-Flagged Cruise Ships.

By its plain terms Title III applies to cruise ships. Congress defined "[s]pecified public transportation" as "transportation by bus, rail, or *any other conveyance* (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis." 42 U.S.C. 12181(10) (emphasis added). Moreover, the "commerce" governed by the ADA encompasses "travel * * * between any foreign country or any territory or possession and any State." *Id.* § 12181(1). Given the express exclusion for airlines (which are governed by a separate disability statute), this provision necessarily refers to cruise ships. See Br. 12-13. The agencies charged with implementing Title III have accordingly determined that cruise ships are covered by the ADA, and their conclusions are entitled to deference. See U.S. Br. 12-15; Pet. Br. 12-13. [1]

[1] Indeed, given that the words "territory" or "possession" are commonly used to refer to such island areas as the Pacific Trust Territories, Puerto Rico, and the Northern Mariana Islands, none of which is contiguous with the continental United States, the exclusion of airlines means that the *only* means of travel between a territory or a possession and a State will be by ship. Under respondent's reading, this provision would be a nullity.

NCL's passing suggestion to the contrary is meritless. Respondent's observation that "[s]hips, foreign or domestic, are not mentioned" in the list of public accommodations (Br. 4), ignores that cruise ships "typically contain guest cabins, eating and drinking establishments, places of exhibition and entertainment, and exercise and recreation facilities." U.S. Br. 13. Furthermore, the examples cited within each category of public accommodations are illustrative rather than exhaustive. DOJ, Title III Technical Assistance Manual III-1.2000 (1993 & 1994 Supp.), *available at* http://www.usdoj.gov/crt/ada/taman3.html.

The fact that Title III applies to cruise ships necessarily implies that it applies to foreign-flagged ships. If Congress had intended the ADA to reach only the two U.S.-flagged cruise ships that existed when the statute was enacted, it would have said so expressly. Br. *Amici Curiae* of Texas et al. 10. Moreover, Congress would not have intended to permit cruise lines to evade ADA compliance through the nicety of securing a flag of convenience. It is implausible to believe that Congress intended to "leave disabled passengers and their traveling companions in an entire segment of the United States travel industry without any protection against discrimination." U.S. Br. 10. That approach would also have disadvantaged the U.S. maritime industry and turned U.S. law into a one-way ratchet of protections for cruise ships without any offsetting obligations. "Those ships are served by the U.S. Coast Guard; they use port facilities built, and channels dredged, at U.S. taxpayers' expense; and they have access to local police and fire protection, while their owners pay little or no U.S. taxes." Br. *Amici Curiae* of Nine Assns. 17.

Congress moreover decisively rejected respondent's suggestion that discrimination will be sufficiently eliminated by "market forces" (Resp. Br. 1) and "business interests" (*ibid.*). Respondent's brief perfectly illustrates why: NCL made the self-interested "economic calculation" that it will do better by discriminating against passengers with disabilities than by abandoning such practices. *Id.* 3. Congress struck

the balance between the costs of accommodations and the economic interests of business owners in a different place: providing not that cruise ships can exempt themselves outright from Title III, but rather that economic considerations can be relevant to determining whether the removal of a particular barrier is "readily achievable." 42 U.S.C. 12181(9); *id.* § 12182(b)(2)(A)(iv).

II. Respondent Seriously Misdescribes The Allocation Of Jurisdiction Over The Conduct Of Foreign-Flagged Vessels In U.S. Territory.

A. U.S. Law Presumptively Applies to Protect Americans in U.S. Territory.

The very first sentence of respondent's brief makes clear that it can prevail only if this Court accepts as a "canon of statutory construction" that "a congressional act shall not be construed to govern a foreign ship unless Congress clearly expresses its intent for that application." Br. 1. In fact, U.S. law presumptively *does* apply to foreign-flagged vessels operating in U.S. territory with only a narrow exception: matters that affect only the "internal order" of the ship or that only incidentally implicate U.S. interests.

1. Petitioners' opening brief demonstrated that U.S. law presumptively governs in our territory, including with respect to foreign-flagged vessels. This rule is embodied in an uninterrupted line of this Court's precedent stretching well over a century and a half, from Chief Justice Marshall's opinion in *The Schooner Exchange* v. *McFaddon (The Exchange)*, 11 U.S. (7 Cranch) 116 (1812), to *International Longshoremen's Ass'n* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970). See Pet. Br. 28-31. Whether a ship chooses to fly a foreign flag does not change the jurisdictional calculus. Although The Bahamas urges the Court to "reject petitioners' unfounded suggestion" that "foreign flagging is a mere 'façade'" (Br. 10), it is in fact *this Court* that has described

foreign flagging as a "façade" entitled to "minor" weight. *Hellenic Lines, Ltd.* v. *Rhoditis*, 398 U.S. 306, 310 (1970).[2]

In arguing to the contrary, respondent relies on *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). But both involved U.S. regulation of the "internal affairs" of the vessel – in particular, the application of U.S. labor law to contracts formed overseas, governed by foreign law, between the foreign ship and its foreign crew. See, *e.g.*, *Int'l Longshoremen's Ass'n* v. *Allied Int'l*, 456 U.S. 212, 221 (1982) ("terms of employment of foreign crews"); *Ariadne*, 397 U.S. at 199-200 ("internal affairs" refers to "seamen on respondent's vessels" and the vessel's "internal discipline and order") (quotation marks omitted). These cases are limited to regulation of "discipline and private matters that do not interest the territorial power" (*Uravic* v. *F. Jarka Co.*, 282 U.S. 234, 239-40 (1931)), in contrast to matters that "involve the peace or dignity of the country, or the tranquillity [sic] of the port" (*Mali* v. *Keeper of the Common Jail of Hudson County (Wildenhus's Case)*, 120 U.S. 1, 12 (1887)).[3] Title III, by contrast does "not extend to areas of a

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[2] This Court's decision in *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100 (1923), illustrates that U.S. law applies to foreign-flagged vessels in our territory even when the statute in question would have extraterritorial effects – there, the inability of vessels leaving the U.S. to carry liquor into international waters. Respondent would distinguish the statute in *Cunard* on the grounds that "Congress specifically exempted transportation by ships through the Panama Canal Zone" and, by amendment, "made it clear that alcohol was not a legitimate sea cargo." Br. 26. But the inescapable fact is that the statute in *Cunard* did not mention foreign-flagged vessels. Congress's findings in the ADA moreover make it equally clear that Title III applies to international transportation by ship. See *supra* at 3.

[3] See also PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 179-81, 191 (1927) (noting, *inter alia*, that the port State's law would apply to any action

facility that are used exclusively as employee work areas." 28 C.F.R. pt. 36, App. B, at 611.

That a port state's laws apply to foreign vessels in its territory, subject only to this limited "internal order" exception, is as well established in international law as the rule that the flag state's law generally governs a ship on the high seas. Indeed, the U.S. has entered into myriad treaties expressly embodying this "internal order" distinction.[4]

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onboard a foreign vessel that constituted a "moral disturbance" as defined by the port State's laws); Letter from the Counselor for the State Department to the British Ambassador (n.d.), *quoted in* 2 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 209 (1941) (stating that "when one of its vessels visits the port of another county, it is * * * subject to the laws which govern the port it visits so long as it remains unless it is otherwise provided by treaty," but "by comity, matters of discipline and all things done on board which affect only the vessel or those belonging to her and do not involve the peace or dignity of the country or the tranquility of the port should be left * * * to be dealt with by the authorities of the nation to which the vessel belongs"); 8 Op. Att'y Gen. 73, 79 (1856) (stating that, in the absence of treaties or other agreements, the territorial jurisdiction may punish a crime committed on a foreign-flagged ship unless the "offence affect only the interior discipline of the ship, without disturbing nor compromising the tranquility of the port").

[4] See, *e.g.*, Consular Convention, Feb. 23, 1853, U.S.-France, art. 8, 10 Stat. 992, 996-97 (the consuls of each country "shall have exclusive charge of the internal order of the merchant vessel of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts"); Consular Convention, Dec. 11, 1871, U.S.-German Empire, art. 13, 17 Stat. 921, 928 (similar); Consular Convention, Nov. 19, 1902, U.S.-Greece, art. 12, 33 Stat. 2122, 2129 (similar); Consular Convention, July 4, 1827, U.S.-Sweden, art. 13, 8 Stat. 346, 352 (similar); Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, art. 23, 33 Stat. 2105, 2116-17; see also 15 Op. Att'y Gen. 178, 180-81

2. Respondent attempts to bring this case within the "internal affairs" doctrine by asserting that the flag state, rather than the coastal state, is responsible for regulating the structure of a foreign-flagged ship. That argument ignores that Title III prohibits discrimination in many respects that have nothing to do with the construction ~~of the~~ ship. This case fundamentally involves the relationship between a cruise line and its passengers and potential passengers. That relationship is manifestly of central concern to the coastal state. Indeed, respondent acknowledged that fact by specifying in its ticket contract that disputes arising under it will be governed by *U.S. law*. J.A. 19, ¶ 28.

Respondent's argument is moreover incorrect on its own terms. While respondent's ships are in U.S. territorial waters and U.S. ports, they are within the plenary jurisdiction of the United States, including with respect to physical aspects of the vessels' construction. The fact that they also must comply with the law of the flag state does not undercut their concurrent obligation to comply with the law of the so-called "coastal state" – here, the United States. Pet. Br. 26-27. See, *e.g.*, *Benz*, 353 U.S. at 142; *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, 124 (1923); *Patterson* v. *Bark Eudora*, 190 U.S. 169, 176 (1903); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812) ; Restatement (Third) of Foreign Relations Law § 513 cmt c. & rptr's n.5 (1986) (*Restatement*) (coastal state has concurrent jurisdiction except in cases of innocent passage).

The contrary claims of respondent and its *amicus* The Bahamas are unfounded and rest on an unjustifiably selective citation of authority. Respondent asserts that it is "accepted customary international law recognized by the United States that the flag state is charged with 'adopting and enforcing laws to protect the welfare of the crew *and passengers* aboard

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(1876) (citing similar treaty with Italy); see generally 2 HACKWORTH, *supra*, at 210.

a ship and to maintain good order thereon,' and for ensuring safety at sea with regard to 'the construction, equipment and seaworthiness of ships'" (Br. 13 (emphasis in Resp. Br.)), and that this responsibility "'continue[s] at all times, wherever the ship is located'" (*id.* 14). Respondent errs to the extent that it suggests that the flag state's power is exclusive. Its quotation of "comment a" to Section 502 of the *Restatement*, which addresses the "Rights and Duties of [the] Flag State," omits the very next sentence, which provides: "As to the *concurrent jurisdiction* of the coastal state over matters that are within the flag state's responsibility under this section, see § 512, Reporters' Notes 5 and 7" (emphasis added). In Section 512, the *Restatement* addresses the "Coastal State['s] Sovereignty Over [The] Territorial Sea," specifying that "the coastal state has the same sovereignty over its territorial sea, and over the air space, sea-bed, and subsoil thereof, as it has in respect of its land territory."

In asserting that the Convention on the High Seas provides "that, 'save in exceptional cases,' the flag state has exclusive jurisdiction over its vessels," Br. 30; see also Bahamas Br. 19, respondent equally misstates the law. The Convention actually provides that "save in exceptional cases expressly provided for in international treaties or in these articles, [a ship] shall be subject to [the flag state's] exclusive jurisdiction *on the high seas*" (Art. 6(1), 13 U.S.T. 2312 (emphasis added)), defined as "all parts of the sea that are *not* included in the territorial sea or in the internal waters of a State" (*id.* Art. 1 (emphasis added)).

Respondent next errs in relying on the United Nations Convention on the Law of the Sea as demonstrating the "regulatory control exercised by the flag state." Br. 13. See also Bahamas Br. 19. In fact, "[i]n the case of ships proceeding to internal waters or a call at a port facility outside internal waters," the Convention authorizes the coastal state to "take the necessary steps to prevent *any* breach of the conditions to which admission of those ships to internal waters or such a call is subject." Art. 25(2), 21 I.L.M. 1261

(emphasis added). The coastal state's jurisdiction to regulate "design, construction, manning or equipment" is limited only in instances of innocent passage through territorial waters – a scenario not implicated here. *Ibid.*

Finally, The Bahamas misdescribes its exchange of diplomatic notes with the United States as establishing that "ships registered with The Bahamas and flying the Bahamian flag are subject to the sovereign control of The Bahamas." Br. 10. In fact, the exchange states clearly that when Bahamanian-flagged ships are in U.S. territory, they are under "the jurisdiction of the United States *and* The Commonwealth of The Bahamas on the same basis as in the coastal ports." Agreement Effected by Exchange of Notes, Oct. 5, 1982, 35 U.S.T. 3843 (emphasis added).

3. Respondent also attempts to bring this case within the "internal affairs" doctrine on the ground that "[a]s important as a crew is to a merchant ship, passengers are even more important to a cruise ship." Resp. Br. 24. There is no support for the claim that the flag state presumptively has exclusive jurisdiction over matters that are "important" to the ship, for those matters will generally be equally or more important to the coastal state. In considering the question presented here, the Eleventh Circuit thus correctly recognized that "this case does not involve the 'internal management and affairs' of a foreign-flag ship; this case is about whether Title III requires a foreign-flag cruise ship reasonably to accommodate a disabled, fare-paying, American passenger while the ship is sailing in American waters." *Stevens* v. *Premier Cruises*, 215 F.3d 1237, 1242 (2000).

On respondent's view that this case falls within the internal affairs doctrine, there is no persuasive basis to distinguish Title III of the ADA from the "public accommodation" provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a, which similarly prohibits discrimination without specifically referring to foreign-flagged ships. If respondent is correct that a foreign-flagged

cruise ship is not a public accommodation for purposes of the ADA, then its position necessarily is that it has the absolute right to discriminate against African-Americans, Hispanics, and Muslims. *Id.* So, too, would it be free to violate the seminal anti-discrimination provisions of 42 U.S.C. 1981.

4. To be sure, the presumption that U.S. law applies to a foreign-flagged vessel in our territory is not absolute. The internal affairs doctrine illustrates that an exception arises when the interest of the United States is so meager – and the interests of the flag state so strong – that Congress presumably would not have intended our law to apply. Although the question is not presented here, it is possible to imagine a narrow class of cases – for example, the relatively rare instance in which a foreign-flagged vessel visits the U.S. not to pick up U.S. passengers, but instead as a temporary destination for foreign passengers – in which even Title III arguably does not apply.

Whether to depart from the basic presumption that U.S. law applies in U.S. territory in an unusual case is properly guided by this Court's decisions articulating maritime choice-of-law principles. See Pet. Br. 34-36. This is not such a case, however. As the National Council on Disability – an independent federal agency – explains:

> the contemporary practice of flying what is known as a "flag of convenience" is simply a business decision that only marginally implicates the sovereign interests of the flagging nation. In stark contrast, however, the United States has a significant interest in ending invidious discrimination against persons with disabilities by cruise lines – particularly when cruise lines are headquartered in the United States, base their ships in U.S. ports, draw their clientele almost exclusively from the United States and advertise and solicit most of their passengers in the United States.

National Council on Disability, *Spector* v. *Norwegian Cruise Line Ltd.* – Background, Legal Issues, and Implications for

Persons with Disabilities i-ii (2005), *available at* http://www.ncd.gov/newsroom/publications/2005/pdf/spector_norwegian.pdf.

The role of choice-of-law analysis is also illustrated by the principal case cited by respondent, *Brown* v. *Duchesne*, 60 U.S. 183 (1857). This Court in *Brown* held that the patent laws did not apply to the foreign vessel in that case because the patent infringement only incidentally involved the United States. "The chief and almost only advantage which the defendant derived from the use of this improvement was on the high seas, and in other places out of the jurisdiction of the United States." *Id.* at 196. The Court made clear that if the patent infringement had occurred *in this country*, U.S. law *would* have applied because in that instance, the defendant "would undoubtedly have trespassed upon the rights of the plaintiff." *Ibid.*

B. Respondent's Contrary Position Would Eviscerate Settled Law Governing the Conduct of Foreign-Flagged Vessels in U.S. Waters.

Respondent's argument that the treatment of passengers within the territory of the coastal state is governed solely by the law of the flag state, to the exclusion of the United States, would entirely rewrite the law of maritime jurisdiction. The very international conventions respondent cites illustrate the point perfectly. Respondent erroneously attempts to create the impression that, while operating in U.S. waters, its vessels are subject to these conventions merely as a consequence of the law of the flag state. But as respondent's own *amici* explain, those conventions apply in U.S. territorial waters as a matter of *U.S.* law: "Congress has, by statute, prescribed that foreign vessels visiting U.S. ports must be in compliance with such International Maritime Organization instruments as the Convention on Safety of Life at Sea (SOLAS), see 46 U.S.C. 3505, and the Convention on the Prevention of Marine Pollution (MARPOL), see 33 U.S.C. 1904(c) & (d)." P&I Clubs Br. 20. Under those statutes, if The Bahamas were to

withdraw from the conventions, respondent would still remain obligated to comply with them while in U.S. waters.

Numerous U.S. laws dictate the structure of foreign-flagged vessels. For example, respondent itself cites federal legislation in which the United States deviates from the international conventions governing the hull structure of vessels. Br. 33. The Centers for Disease Control also have an active program of inspecting vessels for disease and have issued guidelines for the construction of cruise ships. See Centers for Disease Control, Recommended Shipbuilding Construction Guidelines for Cruise Vessels Destined to Call on U.S. Ports (2001), *available at* http://www.cdc.gov/nceh/vsp/pub/construction%20manual-august%202001.pdf.

It is no answer that these measures specifically refer to foreign-flagged vessels, for respondent's argument goes fundamentally to the allocation of jurisdiction between the flag and coastal states. But in any event, innumerable provisions of U.S. law – including Title II of the Civil Rights Act of 1964, see *supra* at 10 – apply to foreign-flagged vessels without any express statement to that effect. This Court has squarely held that the National Labor Relations Act applies to the operations of foreign-flagged vessels in cases involving U.S. employees. *Ariadne*, 397 U.S. at 195. Similarly, most laws governing port taxes do not refer specifically to foreign vessels, yet they logically apply to foreign-flagged cruise ships. Harbor Maintenance Tax, 26 U.S.C. 4461-4462; Miscellaneous Excise Taxes, 26 U.S.C. 4471-4472. Further, it cannot be seriously argued that NCL is free to violate, for example, the antitrust and racketeering statutes (neither of which mentions foreign-flagged vessels), but that is the necessary consequence of its sweeping position.

Respondent cannot distinguish those statutes on the ground that they do not involve physical changes to the vessel. The same is true of the principal precedents on which respondent relies, which involve the application of federal labor law to the crew of foreign-flagged vessels, and not the

regulation of the ship's construction. In any event, this Court squarely held that the Jones Act – which no doubt required physical changes to ships – protected U.S. employees on foreign-flagged vessels. See *Uravic*, 282 U.S. 234. Professor Gutoff's brief (at 19-20) demonstrates that federal maritime law generally imposes such obligations on cruise ships, and courts have routinely applied general tort principles to the conduct of cruise ships, principles that surely give rise to physical changes to the vessels.[5]

Respondent argues to the contrary (Br. 30-31 & n.22) that some federal statutes do refer to foreign-flagged vessels. But those examples are inapposite. The Air Carrier Access Act (ACAA), 49 U.S.C. 41705(a), was a specific response to this Court's ruling in *U.S. Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), that the Rehabilitation Act does not apply to commercial airlines because they do not receive federal financial assistance. 132 CONG. REC. S11784-08 (1986) (Sen. Dole). Congress's subsequent amendment to the ACAA – to specify that it applied equally to foreign airlines – simply overturned a ruling that claims against those airlines were preempted by

[5] See, *e.g.*, *Spry* v. *Carnival Cruise Lines*, No. 89-55647, 1991 U.S. App. LEXIS 30598 (CA9 Aug. 12, 1991) (stairs); *Carey* v. *Bahama Cruise Lines*, 864 F.2d 201 (CA1 1988) (gangway); *Silivanch* v. *Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241 (S.D.N.Y. 2001) (spas); *Palmieri* v. *Celebrity Cruise Lines, Inc.*, No. 98 Civ. 2037, 1999 U.S. Dist. LEXIS 10531 (S.D.N.Y. July 13, 1999) (furniture arrangement); *Kunken* v. *Celebrity Cruises, Inc.*, No. 98 Civ. 7304, 1999 U.S. Dist. LEXIS 19321 (S.D.N.Y. Dec. 10, 1999) (doorway ramp); *Parker* v. *Celebrity Cruises, Inc.*, No. 96 Civ. 7469, 1997 U.S. Dist. LEXIS 20666 (S.D.N.Y. Dec. 29, 1997) (collapsing chair); *Monteleone* v. *Bahama Cruise Line, Inc.*, 664 F. Supp. 744 (S.D.N.Y. 1988) (stairs); *Carnival Cruise Lines, Inc.* v. *Snoddy*, 457 So. 2d 379 (Ala. 1984) (bed railing); *Larsen* v. *Sittmar Cruises*, 602 N.Y.S.2d 981 (N.Y. Civ. Ct. 1993) (shower stall); see also Assns. Br. 21 n.75 (identifying other areas in which U.S. law applies to foreign-flagged ships).

the Warsaw Convention. Curtis D. Edmonds, *When Pigs Fly: Litigation Under the Air Carrier Access Act*, 78 N.D. L. REV. 687, 701 (2002). Congress similarly amended Title I of the ADA to specify its extraterritorial application, see 42 U.S.C. 12111(4), 12112(c), in response to this Court's decision in *EEOC* v. *Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 247-49 (1991), that Title VII of the Civil Rights Act of 1964 does not apply overseas. See Arlene S. Kanter, *The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291, 292 (2003). This case, by contrast, involves only the domestic application of Title III.

The remaining statutes cited by NCL illustrate a different point: when Congress enacts legislation focused primarily on ships (as opposed to legislation that covers ships as well as many other facilities or forms of transportation), it sometimes chooses to elaborate on the consequences for foreign vessels. Finally, the many statutory provisions that expressly *exempt* foreign vessels from laws that otherwise would cover them cut against respondent's argument, because these provisions would be unnecessary if federal law presumptively did not reach those ships.[6]

III. Applying Title III To Foreign-Flagged Cruise Ships Does Not Conflict With Any International Obligation.

A. International Law Clearly Does Not Bar Application of Title III to Respondent's Many Acts of Non-Structural Discrimination.

Respondent's brief simply ignores its many acts of discrimination that are totally unrelated to the structure of its ships. Respondent has no serious argument for avoiding the

[6] See, *e.g.*, 26 U.S.C. 861(a)(3), 7701(b)(7) (certain income taxes); 33 U.S.C. 1322(n)(7)(C)(i) (marine sanitation regulations); 46 U.S.C. 14101(4) (vessel measurement); 47 U.S.C. 306 (radio licensing).

application of Title III to those forms of discrimination. No international convention even *obliquely* addresses the question whether cruise lines may discriminate against persons with disabilities. Nor is that subject addressed by the law of the flag state. As the Chamber of Commerce explains, statutes "like the ADA * * * do not have parallels in the Bahamas." Br. 26 n.12. The Bahamas explains that it prefers to "ascribe[] to the aspirations of the ADA" rather than impose actual requirements, for (as it explains in the next sentence) its "fortunes are inextricably intertwined with maritime commerce." Br. 3. The irreducible consequence of respondent's position is that *no* law should apply.

Respondent's unsupported assertion that its ability to flout the ADA's requirements with respect to "[n]on-structural changes" is somehow "critical in a life-threatening situation" (Br. 37-38) is simply absurd. That NCL's safety-related concerns are hollow is plain from the fact that several other cruise lines do not engage in this abject discrimination. How, for example, does NCL enhance the safety of its vessels *by refusing to provide emergency instructions to persons with disabilities?* What life-threatening concerns could conceivably lead NCL to charge higher prices to passengers with disabilities and their companions for accessible rooms; refuse to permit passengers with disabilities to board the ship early so that they can use an accessible restroom; require only passengers with disabilities to waive liability even for injuries completely unrelated to their disabilities; require only passengers with disabilities to travel with a companion even when not justified by safety concerns; discriminate against the companions of passengers with disabilities by making it difficult for them to participate equally in on-board activities; and reserve the right to remove a passenger with disability simply because he or she may threaten the *comfort* of other guests? See Pet. Br. 17-25.[7]

[7] Respondent's assertion that prohibiting its discriminatory pricing policy "would have significant architectural consequences" (Br. 7) is inexplicable. NCL's policy could easily be modified so that persons with disabilities who are currently not eligible for discounted fares are simply *offered a discount*. Because petitioners were ineligible for the "run of the ship" discount as NCL offered it, respondent's claim that "petitioners appear not to have sought to take advantage of this offer, and thus would not appear to have standing to complain about it" (*ibid.*) makes no sense. Respondent also reiterates its assertion in its brief in opposition – which was a basis for its failed effort to reframe the question presented – that this claim was somehow "waived." Br. 7 n.9 (citing BIO 11 n.8). The claim was fully preserved, as explained in petitioners' Reply Brief at the certiorari stage (at 1-2 & n.1).

B. Even as to Construction Requirements, Title III's Application Does Not Conflict with Any International Obligation.

There is no merit to NCL's claims that the application of Title III to its ships would conflict with international law. The international conventions cited by respondent apply equally to ships flagged in the United States, yet respondent *itself* is now bringing into service U.S.-flagged vessels that presumably must comply with the ADA. And although respondent contends that applying Title III to its ships would conflict with international law, at the same time it proudly emphasizes that "the overwhelming majority of desired accessibility measures are being designed and built in the newest" foreign-flagged ships. See Br. 38-39 (detailing extensive "shipwide structural changes"). And other cruise lines comply with Title III in large part. See Pet. Br. 18-24; Assns. Br. 22-25.

1. Much of respondent's objection to "structural" accommodations is simply a play on words, because most of the physical accommodations necessary for a cruise ship to comply with the ADA do not involve the structure or integrity of the vessel itself. For example, petitioners seek to have the doors on toilet stalls swing out, rather than in, and to have grab bars installed so that a person in a wheelchair or a

scooter may maneuver inside. Petitioners seek to have instructions on navigating the ship posted in Braille for persons with visual impairments and to have the height of water fountains lowered. None of these accommodations (nor any similar ones) implicate the safety or structure of the vessel in the slightest. Indeed, if Title III does not apply to its vessels, NCL can decline to make even the most meager accommodations, such as moving boxes and luggage to the sides of hallways when they prevent passengers with mobility impairments from making their way to their cabins.

Respondent broadly asserts that the IMO "has already issued specific accessibility recommendations for vessels" (Br. 22) and that "[b]ecause of The Bahamas' adherence to IMO standards, NCL *must* comply with those standards irrespective of whether they are consistent with whatever a district court might order under the ADA" (Br. 22 (emphasis added)). But the guidelines are, as The Bahamas itself flatly states (at 25), "not binding." Moreover, the guidelines are by their terms limited to ferries; they expressly state that "ferries and cruise ships are very different * * * and should be considered separately." See Maritime Safety Committee, MSC Circ. 735 (1996), *available at* http://www.uscg.mil/hq/gm/nmc/imo/pdf/Circ1/Msc0/735an.pdf.

2. Moreover, the convention on which respondent relies – SOLAS – does not in any sense occupy the field of maritime construction or generally "govern[] maritime architecture." Contra Resp. Br. 9. Rather, as respondent's trade association explains, SOLAS "deals with *safety* at sea" (ICCL Br. 10 (emphasis added)), and even in that respect sets only "minimum" standards (IMO, International Convention for the Safety of Life at Sea, Technical Provisions, *available at* http://www.imo.org/home.asp). The Convention founding the IMO specifies that the "standards" it will adopt relate to "maritime safety, efficiency of navigation and prevention and control of maritime pollution." Convention on the International Maritime Organization, art. 1(a), *in* KENNETH R. SIMMONDS, THE INTERNATIONAL MARITIME ORGANIZATION

51 (1994). The ADA's structural provisions, in contrast, are different in scope, affecting many structural considerations that simply have nothing to do with ship safety.

In all events, no conflict exists between the ADA and any international agreement because Title III by its terms does not override contrary measures relating to safety. As noted *supra* at 11-12, SOLAS and other international agreements apply in U.S. waters as a matter of domestic law because the United States subscribes to them. SOLAS is thus "placed on the same footing, and made of like obligation, with an act of legislation," so that "the courts will always endeavor to construe them so as to give effect to both." *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888).

Title III only requires the removal of barriers to access "where such removal is readily achievable," defined as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12182(b)(2)(A)(iv), 12184(b)(2)(C), 12181(9). Consistent with Congress's intent "that a wide range of factors be considered" (28 C.F.R. Pt. 36 App. B at 681), the implementing regulations call for the consideration of, *inter alia*, "legitimate safety requirements that are necessary for safe operation," as well as "the impact otherwise upon the operation of the site" (28 C.F.R. 36.104). Courts have construed the "readily achievable" language to preclude accommodations that would violate a local land-use ordinance related to parking (*Parr* v. *L&L Drive-Inn Restaurant*, 96 F. Supp. 2d. 1065, 1088-89 (D. Haw. 2000)), or would violate local building requirements in light of "traffic and safety considerations" (*Speciner* v. *NationsBank, N.A.*, 215 F. Supp. 2d. 622, 633 (D. Md. 2002)). *A fortiori*, the "readily achievable" proviso would preclude changes that would violate a treaty – such as SOLAS – that has been incorporated into U.S. law. Cf. *Chevron U.S.A., Inc.* v. *Echazabal*, 536 U.S. 73, 84-85 (2002) (potential conflict with OSHA safety standards creates "business necessity" that justifies disability-based employment discrimination under Title I of the ADA). Notably, the words "readily achievable"

appear in respondent's brief only once: when quoting petitioners' complaint. See Br. 6.

Given the foregoing, "[b]oth the Department of Justice and the Department of Transportation have interpreted [Title III] to apply to foreign-flagged ships, *except* to the extent that enforcing ADA requirements would conflict with a treaty," and have specified that "to the extent that removal of an architectural barrier would conflict with an existing treaty provision, such removal would not be considered 'readily achievable' within the meaning of Title III." U.S. Br. 12 (emphasis added) (collecting authorities). In developing the new draft guidelines governing Title III's application to cruise ships, the government officials charged by Congress with addressing the question accordingly undertook to "structure any requirements to avoid" potential conflicts with "any treaty provisions," specifically including SOLAS. 56 Fed. Reg. 45,600 (1991). In this process, "representatives from the cruise line industry served as committee members and were actively involved in drafting recommendations for proposed regulations addressing accessibility on newly constructed and altered passenger vessels and cruise ships." Br. *Amicus Curiae* of Paralyzed Veterans of Am. et al. 6.

To avoid potential conflicts, the government has proceeded cautiously. Although it has concluded that places of public accommodation on all cruise ships – foreign and domestic, new and old – generally are subject to "all of the title III requirements, including removal of barriers to access where readily achievable," it has specified that the ADA's heightened accessibility requirements for new construction and alterations are not applicable until the government provides particular guidance regarding cruise ships. DOJ, Technical Assistance Manual III-1.2000(D) (Supp. 1994), *available at* http://www.usdoj.gov/crt/ada/taman3up.html.

The government has made substantial progress towards providing such final guidance. The relevant agencies issued a final report in 2000, leading to the publication of draft

guidelines in 2004. See 69 Fed. Reg. 69,244 (Nov. 26, 2004) (Access Board); *id.* at 69,246 (Department of Transportation). The guidelines are exceedingly detailed, reflecting the breadth and depth of the study that led to their publication. See Draft Passenger Accessibility Guidelines, *available at* http://www.access-board.gov/pvaac/guidelines.htm. The ongoing comment process, in which the cruise industry has actively participated, provides ample opportunity to identify any potential conflicts. Notably, the guidelines as promulgated are, in the expert judgment of the relevant officials, "fully consistent with SOLAS" and all other "United States treaty obligations." U.S. Br. 28, 30.

Finally, respondent suggests that it could, *in the future*, be subject to inconsistent coastal-state requirements governing structural accessibility for persons with disabilities. The relevant point is that there is no such conflict today. If inconsistent regimes do emerge in the future, then those conflicts can presumably be addressed through the "readily achievable" requirement already present in the statute or by new legislation. The existence of inconsistent regulatory regimes would moreover likely spur the international community to develop a new convention governing accessibility, just as it did with respect to ship safety in SOLAS. The hypothetical prospect of a conflict cannot be the basis for avoiding any regulation whatsoever. Even the longest journeys must begin somewhere.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioners' opening brief, the judgment should be reversed.

Respectfully submitted.

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